

United States Department of Labor  
**Board of Alien Labor Certification Appeals**  
Washington, D.C.

**'Notice: This is an electronic bench opinion which has not been verified as official'**

Date: August 4, 1997

Case No: 95 INA 341

In the Matter of:

**ROBERTA FELDHUSEN,**  
Employer

On Behalf of:

**JOLANTA OSTASZEWSKA,**  
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of Jolanta Ostaszewska (Alien) by Roberta Feldhusen (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of

---

<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

### **STATEMENT OF THE CASE**

On January 21, 1994, the Employer applied for alien certification to permit her to employ the Alien on a permanent basis as a "Cook Kosher, Live Out" to perform the following duties in her household:

Prepares, seasons, and cooks soups, meats, vegetables, etc. Entrees have to be prepared in accordance with the principles of Kosher cuisine. Bakes, roasts, broils meat, fish and other food. Prepares Kosher entrees, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The work week was forty hours from 9:00 AM to 6:00 PM with no overtime at the rate of \$12.48 per hour. The position was classified as "Cook (Household)(Live-Out)", under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered. In an addendum to the application, the Employer stated on February 10, 1994, that, "Due to the religious considerations meals must be prepared in accordance with principles of Kosher cuisine. All other household chores are performed by an hourly worker who comes to our house once a week."

The cooking would be performed for the members of the Employer's household, which consists of the Employer, who works full time as a teacher, her husband, who is an executive in a computer software and hardware company, and their two children, who are six and eleven years of age. AF 07. Although the job was duly advertised, no response was received. The State employment office commented that, "This does not logically appear to be a 'full-time' job offer solely for cook (household)?" AF 22.

**Notice of Findings.** On June 30, 1994, a Notice of Findings

(NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO said the Employer's application failed to establish that the position at issue was permanent full time employment within the meaning of the regulations after considering the application and the addendum noted above.<sup>2</sup>

The CO required that this finding be rebutted with

evidence that the requirement arises from a business necessity rather than employer preference or convenience and is customary to the employer. To establish business necessity under [20 CFR §] 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and [are] essential to perform the job in a reasonable manner.

AF 24. The CO then listed the evidence required for the Employer to prove that the job offered is a full time position. The data required was stated in the form of requests for specific facts and for responses to explicit questions, all of which were designed to draw out collateral information that addressed this issue. AF 23-24. The CO then stated

We note that this is one of approximately 12 applications filed by Eastern European Council, Ltd., in behalf of employers for full time household Cooks. In all applications, the employer responded in an essentially identical manner to a State of New York inquiry concerning who was presently performing the duties of Household Cook: a relative was currently performing the duties and was no longer able because of either personal or health reasons. Please clarify, explaining how the employer handles these duties when the relative, who is not a paid employee, was unavailable, given the employer's demanding work schedule and health problems.

Essentially, this is a demand that the Employer establish the necessity of the position for her "business," in this instance the operation of a household.<sup>3</sup>

**Rebuttal.** On July 26, 1994, the Employer filed a rebuttal in

---

<sup>2</sup>The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent full time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

<sup>3</sup>The requirement of two years of experience as a kosher cook does not appear to have been raised as an issue in this NOF.

which she described her family's need for the services of a cook who was able to prepare nutritious meals according to principles of "Kosher cuisine." The Employer then answered the CO's inquiries, describing the amount of time needed to assemble, prepare, and serve the meals of the household throughout the day and the week indicated in the application.

**Final Determination.** On November 29, 1994, the CO denied certification on grounds that the Employer failed to prove that the position was full time employment in the Employer's household. In addition, the CO further listed the required information as to the schedules of the family members. After reviewing the list of specific documentation required in the NOF and the Employer's responses to these inquiries, the CO concluded that Employer's rebuttal failed to respond satisfactorily to the demands of the NOF. The work schedule, said the CO, was "unrealistic and contradictory," pointing out the inconsistencies between the work schedule that stated the cook's availability and the family's activities. The CO noted that the cook would not be present at times when the meals were served, and similar conflicts. The CO particularly noted that

the employer has not customarily employed full-time Cooks and the employer presents no current, substantial change in household circumstances to justify the need to employ one now.

AF 29. The CO found that the Employer had not established the full time, permanent nature of the job opportunity; that she had customarily employed full time cooks in the past; or that any substantial change in circumstances had occurred that would require the hiring of a full time cook with no duties other than food preparation. Consequently, the CO concluded that Employer failed to meet the regulatory requirements and the CO then denied this application for alien employment certification.

**Employer's appeal.** In seeking review of the denial of certification the Employer took issue with the CO's findings as to the household schedule, which she said were inconsistent with the evidence of record. She pointed out that the cook's job was to prepare the meals during the stated working hours without regard to the meal times when the food would be served, adding that the time factors stated in the rebuttal did encompass a total of eight working hours per day for this employee. The Employer concluded that the job duties, as described in the rebuttal do constitute full time employment in the context of her household.

## DISCUSSION

The only issue on which the CO decided this application was whether or not the Employer's responses to the NOF establish the "business necessity" of this position. This is an insufficient reason for the denial of certification, as the Employer is not required to prove the necessity for the job, itself, if a bona fide job does exist. **Abedlghani and Houda Abadi**, 90 INA 139 (June 4, 1991); **Hubert Peabody**, 90 INA 230 (Apr 30, 1991).<sup>4</sup> Moreover, the duties of this household employee are sufficiently substantial to occupy an eight hour day of work in the Employer's kitchen.

While the CO appears to weigh certification in terms of 20 CFR § 656.21(b)(2)(i), the Employer's position description does not appear to be at issue, as the work to be performed in this job under the application is set forth in language that closely approximates the text of the job, as classified in the DOT, but for the requirement of kosher food.<sup>5</sup> Moreover, the DOT provides at Appendix C that the Specific Vocational Preparation (SVP) for a cook in domestic service under DOT No. 305.281-010 is level 6, which provides for training of more than one year and up to and including two years, the experience specified in the Employer's application.<sup>6</sup>

Since DOT Code No. 305.281-010 does not provide for a foreign food specialty cook in the household category, the more appropriate inquiry by the CO is whether the Employer documented that the job opportunity is being described without unduly restrictive job requirements within the meaning of 20 CFR § 656.21(b)(2). As the CO did not consider whether or not this was an unduly restrictive condition of employment under the Act and regulations, the file should be returned and this issue should be

---

<sup>4</sup>Also see **Joon Sup Park**, 89 INA 231 (Mar. 25, 1991); **Shinn Shyng Chang**, 88 INA 028 (Sept. 21, 1989); and **Timmy Wu**, 87 INA 735 (June 28, 1988).

<sup>5</sup>**20 CFR § 656.21(b)(2)(i):** ... (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i) The job opportunity's requirement, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the Dictionary of Occupational Titles(D.O.T.) including those for subclasses of jobs; ...

<sup>6</sup>The certification requested is for a "Cook Kosher, Live Out," which was classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. Although under No. 313.361-030 the DOT includes COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.), this classification is limited to workers who are employed in hotels and restaurants, as distinguished from households, however.

addressed in view of the citation of this regulation by the CO.<sup>7</sup>

Accordingly, the following order will enter.

### ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is hereby set aside and this file is remanded for reconsideration for the reasons hereinabove set forth.

For the Panel:

---

FREDERICK D. NEUSNER  
Administrative Law Judge

Judge Holmes, dissenting.

I respectfully dissent. Since the attempted justification for a full time employee as a cook demonstrated inconsistencies in the proposed schedule, I would affirm the denial of certification for the reasons cited by the CO. On remand as determined by the majority I would instruct the CO to inform the Employer that the requirement for experience in Kosher cooking is unduly restrictive and may not be used for the position for which labor certification is requested.

---

<sup>7</sup>The panel disagrees with the dissenting member, as the issue of whether a requirement of experience in Kosher cooking for the position of Domestic Cook is unduly restrictive has never been decided by BALCA. As the issue was never raised by the CO, we conclude that it is remarkably premature to make such a finding in this case before the parties have had an opportunity to present evidence or argument on the issue.

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

# BALCA VOTE SHEET

CASE NO: 95-INA-341

ROBERTA FELDHUSEN, Employer  
JOLANTA OSTASZEWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:			
	:	CONCUR	:	DISSENT	:	COMMENT	:
	:	:	:	:	:	:	:
Holmes	:	:	:	:	:	:	:
	:	:	:	:	:	:	:
	:	:	:	:	:	:	:
Huddleston	:	:	:	:	:	:	:
	:	:	:	:	:	:	:
	:	:	:	:	:	:	:

Thank you,

Judge Neusner

Date: May 6, 1997